

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

February 10, 2006

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RE: Cingular Wireless, Cingular Pennsylvania, LLC v. Sussex County Board of
Adjustment – C.A. No. 05A-06-001

Date Submitted: November 10, 2005

Dear Counsel:

This is the Court's ruling on the Cingular Wireless Motion for Writ of Certiorari.

Statement of Facts

Cingular Wireless, Cingular Pennsylvania, LLC (Cingular), Plaintiff in Error, applied for a special-use exception with Sussex County Board of Adjustment (the Board), Defendant in Error, for the erection of a telecommunications monopole pursuant to Sussex County Code § 115-194.2. The monopole was to be 150 feet tall and, according to Cingular, would provide coverage for a significant gap in its cellular network in the area. The monopole would be placed on a piece of property zoned AR-1, a residential zoning district. After proper notice, a public hearing was held by the Board on March 7, 2005.

There was strong opposition from owners of neighboring properties who were concerned about (i) the negative impact on the property values of the neighborhood, (ii) the potential for

danger due a small airport being nearby, and (iii) whether the alleged lack of quality cell phone service warranted the tower.

The Board received 18 letters in opposition to Cingular's application. Eight of these letters specifically stated that they believed that the monopole would decrease the value of their property and other neighboring properties. Three of the letters specifically stated that they believed that the monopole would create a danger for aircraft to the nearby Eagle Crest Airport. Two other letters specifically questioned the necessity of the tower in that location.

Cingular testified that the location of the proposed monopole would be such that the monopole will be set back from all property lines, well in excess of the setback required by the Code. The monopole would be located approximately two hundred eighty (280) feet from Hudson Road, eight hundred two (802) feet from Sweetbriar Road, and one thousand two seventy seven (1,277) feet from southern property line. These setbacks are in excess of the requirement to maintain setbacks one-third the height of the tower or, in this case, fifty (50) feet. The property where the monopole is to be located is farmed throughout the year. The proposed location of monopole on the property was selected so as to have the least impact upon the agricultural use of the property.

A radio frequency engineer testified on behalf of Cingular. The engineer stated that the area along SR1 and Route 9 is not adequately served by telecommunications network; therefore customers do not have reliable service. The engineer also testified that he performed intricate tests to determine the best way to remedy this problem.

The engineer testified that the most appropriate location for the proposed telecommunication facility (the monopole) would be on the property selected and proposed to the

Board. The engineer presented maps showing the cellular network and how the selected location would fit within the network. Further, the engineer explained that real estate personnel first look for existing structures that can be used to accommodate Cingular's needs. Here, according to the engineer there were no existing structures that could be used. The engineer, as required by §115-194.2D of the Code, submitted a letter stating that other placement options were not available within two miles of the selected location. Therefore, Cingular was required to propose the construction of a new facility; and thus, also request a special-use exception pursuant to the provisions of § 115-194.2 of the Code.

The engineer testified that the Cingular had received a response from the Federal Aviation Administration (FAA) that the tower had no adverse effect on aviation. Cingular also submitted to the Board on March 21, 2005, a letter enclosing the FAA summary analysis. However, the summary analysis is unclear whether the monopole would have an impact on the nearby airport. Page Two of the summary states that there will be "possible impact to private landing facility" and "no impact to private landing facility." Thus, it is unclear whether the FAA has actually cleared the monopole.

The Board tabled its decision on the special-use exception application until its next meeting on March 21, 2005. The Board voted 4-1 to deny the application of Cingular for the special-use exception. The Board based its denial on the evidence submitted in opposition to the application, including the adverse effect on the neighboring property, its impact on nearby airport, and the questionable necessity of the monopole in that location. The notice of decision was published by the Board and it summarized the findings of facts, stating that the Board denied the request because the proposed location was inappropriate for a monopole and it would

adversely affect uses of neighboring properties. The Board made the following findings of fact:

- (1) The Applicant, Cingular Pennsylvania, LLC, was requesting a special-use exception to erect a new communications monopole 150 feet in height, on a 137-acre parcel currently zoned AR-1. The tower is expected to meet all required setbacks, and will be accessed by an existing farm road. The property is currently in agricultural use, and Applicant has obtained permission for the tower from Delaware Farm Land Preservation.
- (2) The Applicant concluded that there were no structures in the area suitable for its purposes, and that the tower is necessary to bridge gaps in coverage.
- (3) Several individuals testified in opposition. Jeri Ludlam testified that the tower would be extremely close to her property and would affect property values. She was also concerned about aircraft in the immediate area and noise that might be generated from the tower and its maintenance. George Ames also testified in opposition, pointing out that the proposed location is at a fairly sizeable road intersection.
- (4) Jay Buck testified in opposition, and expressed a belief that the tower would be dangerous to the area. Because of frequent fog, he believed that small aircraft common to the area would be in danger, and also felt that an unsightly tower would be too close to residential areas. Both he and the previous witness testified that they had no trouble utilizing their cellular phones in the immediate area. Fran Cardaci testified in opposition to the Application and pointed out that there were towers located southwest of Route 9 and Route 1, roughly two miles away. She also pointed out that the Applicant had just received approval for another tower on Route 24, and also pointed out Cingular's advertising that coverage is good in the State of Delaware.

(5) In rebuttal, the Applicant testified that it would not go to the expense of erecting a new tower if it were unnecessary, and that there are no residential dwellings within 400 feet of the proposed location.

(6) The Board determined that the proposed location was inappropriate for a communications tower, and that it would adversely affect uses of neighboring into adjacent properties.¹

Standard of Review

The standard of review on appeals from the Board of Adjustment is limited to the correction of errors of law and a determination of whether substantial evidence exists in the record to support the Board's findings of fact and conclusions of law.² Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.³ If the Board's decision is supported by substantial evidence, a reviewing Court must sustain the Board's decision even if such Court would have decided the case differently if it had come before it in the first instance.⁴ "The burden of persuasion is on the party seeking to overturn a decision of the Board to show that the decision was arbitrary and unreasonable."⁵ In the absence of substantial evidence, the Superior Court may not remand the Board's decision for further proceedings, but rather, may only "reverse or affirm, wholly or partly, or may modify the decision brought up for review."⁶

¹ Taken from Board's Decision found in Exhibit D of Cingular's Brief.

² *Janam an v. New Castle County Board of Adjustment*, 364 A.2d, 1241, 1242 (Del. Super. 1976).

³ *Miller v. Board of Adjustment of Dewey Beach*, 1994 WL 89022, *2 (Del. Super.).

⁴ *Mellow v. Board of Adjustment of New Castle County*, 565 A.2d 947, 954 (Del. Super. 1988), *aff'd*, 567 A.2d 422 (Del. 1989).

⁵ *Mellow*, 565 A.2d at 956 citing *McQuail v. Shell Oil Co.*, 183 A.2d 572, 578 (Del. 1962); *Mobil Oil Corp. v. Board of Adjustment*, 283 A.2d 837, 839 (Del. Super. 1971).

⁶ *Mellow*, 565 A.2d at 950 citing 9 Del. C. §1353(f).

Discussion

Cingular argues in its appeal that the Board's decision was not based on substantial evidence and must be overturned. Cingular states that the Board's decision does not reflect the specific evidence set forth in the Record and Transcripts from the special-use exception hearings. Cingular explains that the Board was required to consider whether the monopole would substantially affect adversely the uses of adjacent and neighboring properties, and the Board must consider the well established criteria for a special-use exception as set forth in the Sussex County Code. Cingular claims to have presented un rebutted evidence that the monopole was necessary, would maintain all setbacks as required by the Code; and that all other Code requirements would be met, thereby satisfying the requirements for a special-use exception of this nature. Cingular argues that the Board did not adequately consider these factors when making its decision; instead focusing on lay opinion testimony about concerns about allowing the monopole. Also, Cingular states that the Board also relied on comments made a Board member during deliberations.

I find it unnecessary to review all of Cingular's claims because Cingular failed to present any evidence as to the tower's impact on the neighborhood. The fact that the tower is in the middle of a field and had no adverse impact on agriculture does not translate into not having an adverse impact on those living nearby.

In deciding whether to grant a special-use exception, the Board must find that, 'in its opinion, as a matter of fact, such exceptions will not substantially affect adversely the uses of adjacent and neighboring property[.]''⁷ The burden of demonstrating that the proposed use will

⁷ *Ludem a v. Callaway*, 2005 WL 1953046, *2 (Del. Super.).

not affect neighboring properties must be carried by the special-use exception applicant.⁸

Cingular only presented evidence that the monopoly would not adversely affect the agriculture in the surrounding area. Cingular needed to provide evidence that the exception would not have an adverse effect on the neighboring properties⁹, and did not do that. Therefore, Cingular did not satisfy its burden, and the Board correctly denied Cingular's application.

Conclusion

For the above-stated reasons, the Board's decision is upheld.

Very truly yours,

T. Henley Graves

THG/jfg
oc: Prothonotary

⁸ *Rollins Broadcasting of Delaware, Inc. v. Hollingsworth*, 248 A.2d 143, 145 (Del. 1968).

⁹ *Ludema*, 2005 WL 1953046 at *2.